



October 2, 2014

VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. EPA Region 5 (MI-9J)
77 West Jackson Blvd.
Chicago, IL 60604-3590
r5foia@epa.gov

**RE: Freedom of Information Act request regarding Duke Energy Indiana's
Gibson Generating Station**

Dear Freedom of Information Officer:

This is a request for information on behalf of Sierra Club and Earthjustice (collectively, "Public Interest Groups") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the U.S. Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.107. The Public Interest Groups also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

I. Records Requested

This request seeks information related to the Gibson Generating Station ("Gibson"), which is located at 1097 N CR 950 W, Owensville, Indiana 47665, and owned by Duke Energy Indiana, Inc. ("Duke"). Specifically, the Public Interest Groups request the following records concerning Gibson:

- All records concerning any determination regarding the need for a National Pollutant Discharge Elimination System ("NPDES") permit for discharges into the Gibson facility's cooling pond (also referred to as the "Gibson Lake Cooling Pond" or, simply, "Gibson Lake"). This is inclusive of, but not limited to, any determinations by EPA, the Indiana Department of Environmental Management, or any other agency as to whether the Gibson cooling pond is subject to Clean Water Act ("CWA") jurisdiction, and any correspondence or internal notes related to this issue. The timeframe for this request is January 1, 1970, to the present.

For purposes of this request, the term “records” means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), applications, permits, reports, studies, letters, comments, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, “and” and “or” shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s FOIA regulations contain an identical requirement. 40 C.F.R. § 2.107. The U.S. Department of Justice (“DOJ”) has identified six factors to assess whether a

requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.¹ These factors are:

- A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’
 - (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
 - (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
 - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
 - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
 - (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
 - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’²

The Public Interest Groups’ request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

¹ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

² Markman, *supra* note 1.

A. Public Interest Factor

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 40 C.F.R. § 2.107(l)(1). The Public Interest Groups’ request complies with all of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

The Public Interest Groups seek information related to the potential need for a NPDES permit for discharges into Gibson Lake, and for information about the CWA jurisdictional status of the Lake more generally. Records regarding NPDES permitting determinations and CWA jurisdiction plainly concern “operations or activities of the Government.” 40 C.F.R. § 2.107(l)(1).

ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.

The records the Public Interest Groups have requested bear upon the legal, scientific, and technical basis for CWA jurisdictional status of Gibson Lake. As such, these records are of vital importance to evaluating the possible need for a NPDES permit and are necessary for the public to critically assess and fully evaluate the requested Duke’s potential compliance with the Clean Water Act. Thus, disclosure is “likely to contribute” to public understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii).

iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). Media reports have already drawn public scrutiny to the problems associated with coal plant wastewater, including water pollution issues at Gibson Lake specifically.³ And EPA is currently developing new regulations governing discharges from steam electric power plants that will apply to power plant discharges within the CWA’s jurisdiction.⁴ Moreover, the Gibson facility discharges ash pond effluent into Gibson Lake, which has resulted in elevated selenium levels at the Lake since at least 2007.⁵ Thus, any

³ See, e.g., Sarah Coefield & Environmental Health News, *EPA Set to Regulate Wastewater from Coal-Fired Power Plants*, Scientific American (Dec. 4, 2009), available at <http://www.scientificamerican.com/article/selenium-wastewater-coal-power-plant-gibson-lake/>.

⁴ 78 Fed. Reg. 34432 (June 7, 2013); see generally EPA, Proposed Effluent Guidelines for the Steam Electric Power Generating Category, available at <http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm>.

⁵ U.S. EPA, Steam Electric Power Generating Point Source Category: Final Detailed Study Report at 2-9, 6-13 (Oct. 2009), available at http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/Steam-Electric_Detailed-Study-Report_2009.pdf; U.S. Fish & Wildlife Service, *Selenium Threat Averted* (June 19, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006481172877&disposition=attachment&contentType=pdf> (noting that selenium contamination at Cane Ridge Wildlife Management Area was traced to the discharge of wastewater from the Gibson facility); Coefield & Environmental Health News, *supra* note 3.

currently non-public information concerning the jurisdictional status of the Lake would likely receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public. The Sierra Club is the nation's oldest and largest grassroots environmental organization, with nearly 600,000 members and hundreds of thousands additional online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through a radio show, an extensive online information system, web videos, and news reports.

The Sierra Club's Beyond Coal campaign is a multi-million dollar effort to "replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built."⁶ As part of its campaign, Sierra Club seeks to ensure that waterways are protected from coal-related water pollution.⁷ The campaign participates in dozens of proceedings annually, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and it communicates with them regularly.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.⁸ Earthjustice has made safeguarding the nation's waters one of its top priorities. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Water Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act. In addition, Earthjustice has the "ability and intention" to convey this information to the public.⁹ Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media.

The Public Interest Groups have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public. The Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding these proposed permit renewals. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the requested information.

⁶ See <http://content.sierraclub.org/coal/about-the-campaign>.

⁷ See <http://content.sierraclub.org/coal/water>.

⁸ See <http://earthjustice.org/about>.

⁹ See, e.g., Markman, *supra* note 1.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information the Public Interest Groups seek will contribute “significantly” to the ongoing public conversation about utilities’ management of coal combustion waste. 40 C.F.R. § 2.107(l)(2)(iv). Public Interest Groups are requesting records that are currently not public but are essential to evaluating Gibson Lake’s CWA jurisdictional status and are necessary for the public to critically assess and fully evaluate Duke’s compliance with the CWA and EPA’s forthcoming CWA regulations of discharges from steam electric power plants. As noted above, the Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding this permit application. Releasing this information will, thus, significantly enhance public understanding of CWA jurisdiction at this site.

B. Commercial Interest Factor

The Sierra Club is a non-profit organization, registered under sections 501(c)(3) and 501(c)(4) of the tax code. Earthjustice is a non-profit public interest law organization. The Public Interest Groups have no commercial, trade, or profit interests in this information. The Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts tied to ensuring CWA compliance, with the purpose of protecting water quality in the Wabash River watershed. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.32.

Please let me know if you have any questions or need clarification on any part of this request. Thank you for your time and consideration.

Sincerely,



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Submitted on behalf of Sierra Club